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Pennsylvania Constitutional Law - Search and Seizure - Right to Privacy - Individual Banking Records

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PENNSYLVANIA CONSTITUTIONAL LAW—SEARCH AND SEIZURE—RIGHT TO PRIVACY—INDIVIDUAL BANKING RECORDS. The Pennsylvania Supreme Court has held that the Pennsylvania Constitution protects an individual bank depositor's records from unauthorized police subpoenas when no legal proceedings have been instituted against the individual.

Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979)

Jill DeJohn, an Allegheny County housewife, was convicted in the Court of Common Pleas on counts of attempted theft by extortion and murder of the third degree in the death of her husband.¹ The victim, Michael DeJohn, was found dead in the garage of the couple's Ross Township home. Death was caused by a single gunshot wound to the back of his head.² During the investigation of the shooting, the police acquired information from a victim of an alleged blackmail attempt which implicated Mrs. DeJohn as the author of an anonymous type-written extortion letter.³ Evidence of financial distress uncovered during the investigation of Mrs. DeJohn's involvement in the abortive extortion attempt⁴ led the police to suspect that Mrs. DeJohn had murdered her husband. The police then obtained two subpoenas from the District Attorney's office⁵ directing the DeJohns' bank to submit copies of all bank account transactions and loan applications made by either or both of the DeJohns. The bank complied with the order and turned over the DeJohns' bank records to the police. At the time of the issuance and use of the subpoenas, Mrs. DeJohn was not under indictment for either the attempted extortion or for the death of her husband, nor did she consent to the search. Further, there had been no judicial authorization to investigate Mrs. DeJohn.⁶

1. *Commonwealth v. DeJohn*, 403 A.2d 1283, 1284 (Pa. 1979). Mrs. DeJohn was acquitted on a forgery charge in a nonjury proceeding.

2. *Id.* Mrs. DeJohn testified that the only items found missing were a small amount of money and a .25 caliber automatic pistol, which was kept in the drawer of an adjacent gameroom. Michael DeJohn's watch, ring, and wallet were found undisturbed on his person. The wallet contained \$46 in cash and several credit cards. *Id.*

3. *Id.* at 1285. Mrs. DeJohn admitted at trial that she had composed an extortion note demanding \$5,000, addressed to a neighbor of the DeJohns. *Id.*

4. *Id.* at 1293. The extortion note was received by the intended victim a few days before Mrs. DeJohn's death. *Id.*

5. *Id.* at 1287. The subpoenas were signed by the clerk of courts. It was also noted by the court that failure to comply with such a subpoena could have subjected the bank and its officials to fines or imprisonment. *Id.*

6. *Id.* The court observed that police subpoenas had been common investigative tools for the discovery of evidence held by third parties, and had frequently been served on banks by the police and other government units without judicial sanction. *Id.*

Information obtained from one of the subpoenaed checks documented Mrs. DeJohn's purchase of the typewriter used to type the extortion note,⁷ and the introduction of this evidence was instrumental in securing Mrs. DeJohn's extortion conviction.⁸ Other evidence taken from the bank records reinforced the general impression that the DeJohns were deeply in debt. The bank records showed that Mrs. DeJohn, as manager of the family finances, had resorted to illegal methods to conceal the full extent of their insolvency from her husband. For example, she had forged his signature on a bank loan application rather than reveal their true financial plight to him.⁹ Her forgery and extortion efforts, together with her status as the beneficiary of her husband's substantial life insurance policy,¹⁰ apparently established to the satisfaction of the jury that Mrs. DeJohn had a strong financial motive for murder.¹¹ The trial court denied her motion to suppress the use of the bank records as evidence in the murder trial after finding that the seizure of the records did not violate her constitutional right to be free from unreasonable search and seizure.¹²

On appeal,¹³ the Pennsylvania Supreme Court¹⁴ reversed the murder conviction,¹⁵ ruling that the bank statements had been illegally seized

7. *Id.* at 1292.

8. *Id.* at 1291-92. The check itself was not introduced at the extortion trial, but evidence that it had been used to purchase the typewriter was interjected during an exchange between the prosecutor and a witness. Moreover, Mrs. DeJohn admitted purchasing the typewriter with the check that had been seized pursuant to the invalid subpoena. Although she admitted to typing the extortion note, she contended that she later abandoned the scheme. *Id.*

9. The DeJohns had debts of approximately \$10,000 in addition to a house mortgage on which they were late in making their installment payments. *Id.* at 1285.

10. *Id.* Mrs. DeJohn had been named as the primary beneficiary of her husband's \$201,000 life insurance policy. *Id.*

11. *Id.* at 1286.

12. *Id.* at 1287.

13. The supreme court heard the murder conviction on direct appeal. The extortion conviction was appealed to the superior court, which certified the appeal to the supreme court. *Id.* at 1284 & n.1.

14. Justice O'Brien authored the opinion of the court, joined by Chief Justice Eagen and Justice Nix. Justice Roberts filed a concurring opinion. Justice Larsen concurred in the affirmation of the extortion conviction and dissented in the reversal of the third degree murder sentence. Justice Manderino dissented from the plurality's affirmation of the extortion conviction, and from their remand for a new trial on the murder charge, as he found no evidence of proof beyond a reasonable doubt that Mrs. DeJohn had murdered her husband. Justice Pomeroy took no part in the decision.

15. 403 A.2d at 1292. The plurality opinion found that the circumstantial evidence would have been sufficient to sustain the murder conviction if not for the tainted source of that evidence. *Id.* at 1286. Justice O'Brien reasoned that the immediate circumstances of Mr. DeJohn's death supported a probable inference of appellant's culpability. She was the only adult known to have been at the DeJohn home when the victim was shot and

in violation of Mrs. DeJohn's state constitutional rights, and that a new trial was therefore required.¹⁶ However, the court did not disturb the extortion conviction since the illegally taken records were only indirectly introduced at the extortion proceedings.¹⁷ Justice O'Brien spoke for a majority of the court¹⁸ in deciding whether the non-judicially authorized seizure of bank records violates an individual bank depositor's right to be free of unreasonable violations of his privacy rights. Justice O'Brien based his affirmative conclusion on the guarantee against unreasonable searches contained in the Pennsylvania Constitution.¹⁹ Even though the language of the state constitutional provision is almost identical to that of the fourth amendment²⁰ to the Federal Constitution, the *DeJohn* court refused to follow the United States Supreme Court's latest pronouncement on the subject in *United States v. Miller*,²¹ where, in a similar factual situation, the confidentiality of bank records was denied. Justice O'Brien strongly opposed the *Miller* Court's sanction of an informal police subpoena as a valid mode of investigation as long as no direct intrusion into the suspect's private sphere of personally held possessions was involved.²² Instead, the

there was no evidence of forced entry to corroborate Mrs. DeJohn's explanation that an armed burglar had shot her husband. *Id.* The court further observed that Mrs. DeJohn knew how to use a gun, and that Mr. DeJohn's experience in the Army as a "Green Beret" belied the possibility that a stranger could get within pointblank range to shoot him. *Id.* at 1285.

16. *Id.* at 1292.

17. *Id.* See note 8 *supra*.

18. Although only Chief Justice Eagen and Justice Nix joined in Justice O'Brien's opinion, a majority of the court found that the unauthorized seizure of Mrs. DeJohn's bank records violated her state constitutional rights because Justice Manderino, in his dissenting opinion, agreed with the plurality on this point. 403 A.2d at 1307 (Manderino, J., dissenting).

19. The Pennsylvania Constitution provides, in relevant part, as follows:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. 1, § 8.

20. The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

21. 425 U.S. 435 (1976) (police subpoena of bank records of suspected bootlegger prior to indictment does not violate fourth amendment privacy rights).

22. 403 A.2d at 1289.

Pennsylvania court cited its earlier decision in *Commonwealth v. Polak*²³ for the proposition that subpoenas directed to a third party are properly used to investigate individuals only if legal proceedings have already been instituted against them.²⁴ The *DeJohn* court extended *Polak* to bar the use of an informal police subpoena to obtain evidence which is divulged to third parties involved in the banking transactions of an unindicted suspect.²⁵

In reaching this conclusion, the *DeJohn* court refused to accept the *Miller* Court's declaration that the personal nature of federal fourth amendment rights protects the individual against an unauthorized seizure of his papers only if the papers are directly owned or legitimately held by him.²⁶ In defining the commonwealth's constitutional guarantees against illegal searches and seizures, the court reiterated

23. 438 Pa. 67, 263 A.2d 354 (1970). *Polak* held that police seizure of allegedly pornographic films from their owner, an adult bookstore proprietor, prior to his indictment violated the provision of PA. STAT. ANN. tit. 17, § 2079 (Purdon 1962), which required that a matter involving the suspect be before the court prior to the issuance of a court subpoena directed to a third party. 438 Pa. at 69, 263 A.2d at 355.

24. 403 A.2d at 1287.

25. *Id.* at 1291.

26. *Id.* at 1289-90. See *United States v. Miller*, 425 U.S. 435, 440-42 (1976), where the Court held that a bank depositor lacked standing to challenge a nonjudicially sanctioned subpoena due to the depositor's lack of proprietary or possessory interest in the seized bank records, which in the federal court's analysis, belonged solely to the bank. *Miller* is based on the view that an individual bank depositor is a participant in a wholly commercial transaction that is amenable to government surveillance. See *Pray, A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. Miller*, 14 SAN DIEGO L. REV. 414 (1977) [hereinafter cited as *Pray*]; Alexander & Spurgeon, *Privacy, Banking Records and the Supreme Court: A Before and After Look at Miller*, 10 SW. U.L. REV. 13 (1978). Since the privacy rights covered by the federal fourth amendment are easily defined in terms of individual ownership or possession, a proprietary-oriented analysis has generally controlled the federal court's disposition of search and seizure cases in situations in which items concerning one individual were taken from a third party without judicial warrant. See *Boyd v. United States*, 116 U.S. 616 (1886). The federal courts have taken the position that uncoerced disclosure of information to third parties satisfies the *Katz* criteria that a voluntary and conscious exposure by individuals of their possessions to others waives any reasonable expectation that the entrusted third parties will respect their privacy. See *Couch v. United States*, 409 U.S. 322 (1973); *Donaldson v. United States*, 400 U.S. 517 (1971); *Harris v. United States*, 413 F.2d 316 (9th Cir. 1969). These cases involved challenges by taxpayers to Internal Revenue Service administrative subpoenas of their bank records, which were used to determine taxable income. They were decided against the taxpayers on the grounds that 1) the subpoenaed records, usually microfilmed checks and account deposit and withdrawal schedules, had been compiled by the bank to verify customer balances and thus were business records owned by the bank rather than by the depositors; and 2) the relationship between the bank and its customers was that of debtor and creditor. Therefore, the depositor has no privilege of confidentiality for his communications with his bank.

its recent holding in *Commonwealth v. White*.²⁷ In *White*, the court held that the individual's effects and possessions as well as his person are protected from unreasonable search and seizure. From that principle, it followed that the constitutional protection is not dependent upon the physical presence or physical absence of the individual owner, but rather, depends upon whether or not the individual's expectation of freedom from intrusion is reasonable.²⁸

In addition to its reliance upon prior Pennsylvania cases,²⁹ the *DeJohn* court followed the holding of a California decision, *Burrows v. Superior Court*,³⁰ in which a bank depositor successfully challenged a police subpoena similar to that used in *DeJohn* to obtain evidence for criminal prosecution. Justice O'Brien placed particular emphasis on the reasoning of *Burrows* that modern financial management necessitates widespread use of banking facilities.³¹ The *DeJohn* court adopted the *Burrows* distinction between the depositor's limited waiver of his privacy rights to permit the individual processing of his checks by his bank, and the legitimate expectations of privacy he retains against third party scrutiny of his bank records in their totality.³² The court noted that such an expectation of privacy is reasonable since bank statements can reveal an intimate biographical profile of the depositor's lifestyle by disclosing his debtors, creditors, and charitable concerns.³³

Moreover, the *DeJohn* majority rejected the commonwealth's contention that *Burrows* was inapplicable because the California Constitution contained an explicit guarantee of personal privacy, a feature which the Pennsylvania Constitution lacked.³⁴ The absence of an explicit provision was not deemed controlling by Justice O'Brien, since in

27. 459 Pa. 84, 327 A.2d 40 (1974), *cert. denied*, 421 U.S. 971 (1975). See notes 60 & 62 and accompanying text *infra*.

28. 459 Pa. at 89-90, 327 A.2d at 42.

29. See *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973), *cert. denied*, 417 U.S. 976 (1974); *Commonwealth v. Harris*, 429 Pa. 215, 239 A.2d 290 (1968). See also notes 61 & 62 and accompanying text *infra*.

30. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

31. *Commonwealth v. DeJohn*, 403 A.2d at 1289-90.

32. *Id.* at 1290-91. See also Pray, *supra* note 26, at 425, cited by the *DeJohn* court for the proposition that the brief exposure of an individual's checks to bank personnel for negotiation does not permit a broad scrutiny of the individual's financial condition. 403 A.2d at 1290-91.

33. 403 A.2d at 1289-90 (citing *Burrows*, 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169).

34. 403 A.2d at 1283. Compare PA. CONST. art. I, § 8, quoted at note 21 *supra* with CAL. CONST. art. 1, § 1, which provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and *privacy*." (emphasis added).

Commonwealth v. Platou,³⁵ the state supreme court had held that the right to be free from unreasonable search and seizure contained in the state constitution is premised upon the implicit right to privacy in Pennsylvania.³⁶ The *DeJohn* court also relied upon the United States Supreme Court's decision in *Griswold v. Connecticut*,³⁷ in which Justice Douglas elaborated his penumbra theory of constitutional interpretation, which declared that the Federal Bill of Rights should be broadly construed so as to increase the scope of protection of individual rights as necessary.³⁸ Thus, the rationale of the California court in *Burrows v. Superior Court* was found to be applicable to the *DeJohn* controversy.³⁹

Justice O'Brien further observed that the *Burrows* decision, in recognizing modern electronic realities, was more persuasive than the simplistic proprietary analysis rejected in *Katz v. United States*,⁴⁰ which held that an individual's reasonable expectation of privacy is protected by the federal constitutional guarantees against unreasonable search and seizure.⁴¹ He noted that the *United States v. Miller* decision marked a return to the arbitrary criteria which *Katz* had opposed, in that the *Miller* Court resurrected the proprietary analysis to deny the individual standing to assert a violation of constitutional rights.⁴²

The court concluded that because *Miller* establishes a dangerous precedent, it should not be followed when construing the state constitutional guarantees against unreasonable searches and seizures.⁴³ The court found that *Miller* could be ignored by state courts when interpreting their own constitutions, since under settled principles of federal constitutional law, a state may impose standards on searches

35. 455 Pa. 258, 312 A.2d 29 (1973), *cert. denied*, 417 U.S. 976 (1974). See note 56 *infra*.

36. 403 A.2d at 1291.

37. 381 U.S. 479 (1965) (privacy of communications between woman and family planning advisor upheld).

38. *Id.* at 483-84.

39. *Commonwealth v. DeJohn*, 403 A.2d at 1291.

40. 389 U.S. 347 (1967). In *Katz*, the police had monitored a telephone call made by a bookie from a public telephone booth. The surveillance was accomplished by attaching an electronic listening device to the outside of the telephone booth. The Court held that this practice violated the bookie's fourth amendment rights, since he was entitled to his reasonable expectation of privacy in the monitored activity. *Katz* overruled the "trespass doctrine" which had first been expressed in *Olmstead v. United States*, 277 U.S. 438 (1928) and had later been reaffirmed in *Goldman v. United States*, 316 U.S. 129 (1942). Under the *Olmstead* doctrine a direct physical intrusion into property either owned or legitimately possessed by the individual was a prerequisite for claiming federal constitutional protection against illegal search and seizure. 389 U.S. at 352-53.

41. 403 A.2d at 1290.

42. See *id.* In *Miller*, the court held that the bank held proprietary interests since it had prepared the records. 425 U.S. at 440-41.

43. 403 A.2d at 1289.

and seizures higher than those required by the federal constitution.⁴⁴

Justice Roberts concurred in the majority result, but did not find it necessary to use state constitutional grounds to determine if the bank records should have been admitted into evidence.⁴⁵ However, since the court had reached the state constitutional question, Justice Roberts took the opportunity to postulate that the relationship between a bank and its customers was "something less than a constitutional right of privacy and something more than a confidential relationship."⁴⁶ Therefore, he favored a role which would accommodate all competing interests by making bank records available upon compliance with proper legal process.⁴⁷

Justice Larsen, dissenting from the majority view, agreed with the *Miller* decision that the wholly commercial nature of the bank-customer relationship prevented the depositor from challenging informal government access to his bank records.⁴⁸ Moreover, Justice Larsen objected to the court's absolute application of the exclusionary rule for the illegally seized evidence.⁴⁹ The dissenter claimed that a selective application⁵⁰ of the exclusionary rule should have been utilized since Mrs. DeJohn was not materially harmed by the seizure of her bank records, and no direct invasion of her home or personally-held effects was involved.⁵¹ In contrast, Justice Manderino joined that portion of the court's opinion holding that the bank records were inadmissible as evidence in the murder trial due to their illegal seizure.⁵² However, he insisted that the extortion indictment should also have been reversed and remanded for a new trial. In his view, the court's distinction between the direct use of the tainted evidence at the murder trial, and

44. *Id.* at 1288. See *Cooper v. California*, 386 U.S. 58 (1967).

45. *Commonwealth v. DeJohn*, 403 A.2d at 1293 (Roberts, J., concurring). In Justice Robert's view, the evidence was insufficient to sustain a third degree murder conviction. Since a majority of the court did not agree with this view, he further contended that a new trial was warranted because evidence of Mrs. DeJohn's prior criminal conduct had been admitted improperly. *Id.* at 1292.

46. *Id.* at 1293 (Roberts, J., concurring).

47. *Id.* Despite his concern for effective law enforcement, Justice Roberts did not specify how his view differed from that of the majority, since under the majority view, bank records could presumably be taken pursuant to a valid subpoena.

48. *Id.* at 1293-94 (Larsen, J., concurring in part and dissenting in part).

49. *Id.* The use of the exclusionary rule as a remedy for the violation of federal constitutional rights first occurred in *Weeks v. United States*, 232 U.S. 383 (1914).

50. 403 A.2d at 1299-1300 (Larsen, J., concurring in part and dissenting in part). Justice Larsen used the selective application model contained in the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS290.2 (Proposed Official Draft 1975).

51. 403 A.2d at 1301 (Larsen, J., concurring in part and dissenting in part).

52. *Id.* at 1307 (Manderino, J., dissenting).

the indirect use of the bank records in the extortion trial,⁵³ was an irrelevant qualification.⁵⁴

The *DeJohn* court's declaration that an individual bank depositor's statements are secure from informal government inspection is a natural corollary to recent Pennsylvania decisions which drew heavily upon the *Katz* notions of individual privacy rights.⁵⁵ The prior decisions of the Pennsylvania Supreme Court in *Commonwealth v. Platou*,⁵⁶ *Commonwealth v. White*,⁵⁷ and *Commonwealth v. Treftz*⁵⁸ established the state's adoption of the *Katz* standard that an individual's constitutionally protected interests are defined by the reasonableness of his expectations of privacy in his social and business dealings, rather than by the extent of his proprietary or possessory claims on the confiscated items or information. In *Commonwealth v. Platou*, one of the first Pennsylvania cases dealing with unreasonable searches after *Katz*, the state supreme court declared that the police had violated the privacy rights of an individual whose suitcase was discovered and opened during a legitimate search of his friend's apartment.⁵⁹ The

53. See text accompanying note 17 *supra*.

54. 403 A.2d at 1307 (Manderino, J., dissenting). According to Justice Manderino, it was immaterial that the typewriter check itself was not introduced into evidence, since the total contents of the check were read into evidence.

55. See note 40 and accompanying text *supra*.

56. 455 Pa. 258, 312 A.2d 29 (1973), *cert. denied*, 417 U.S. 976 (1974). The *Platou* court cited its previous decision in *Commonwealth v. Storck*, 442 Pa. 197, 275 A.2d 362 (1971), in which the court ruled that one person cannot waive the rights of another to be free from unreasonable search and seizure. Thus, the *Platou* court held that the consent of the owner of the premises to the search of his absent friend's suitcase did not mitigate the violation of the appellant's rights. 455 Pa. at 262-63, 312 A.2d at 32. The court emphasized that the officer executing the search warrant had no authority to exceed its scope, which was limited to the seizure of the apartment owner's effects. There was neither probable cause nor prior legal authorization to search the appellant's suitcase stored on the premises. *Id.*, 312 A.2d at 32-33.

57. 459 Pa. 84, 327 A.2d 40 (1974), *cert. denied*, 421 U.S. 971 (1975). The *White* court cited *Platou* for the proposition that the protection of an individual's effects from unreasonable search or seizure does not depend upon his physical presence or absence from the place where they are taken, provided that the articles are stored in a reasonably discreet fashion. *Id.* at 89-90, 327 A.2d at 42-43.

58. 465 Pa. 614, 351 A.2d 265, *cert. denied*, 426 U.S. 940 (1976). *Treftz* held that the privacy rights of the appellant, an occasional visitor to the home of the murder victim, were not violated by the search of the victim's home without prior judicial approval. *Id.* at 623, 351 A.2d at 269. The key factors in the ruling were the appellant's infrequent contacts with the premises, and his lack of a possessory interest in either the corpse or in any of the other evidence seized at the victim's home which implicated the appellant in the slaying. *Id.* at 622, 351 A.2d at 268-69. *Treftz* reiterated the *Platou* rule that the appellant's lack of legal title to the searched premises was an irrelevant consideration in determining the extent of his privacy rights in the searched premises. *Id.* at 623, 351 A.2d at 269.

59. 455 Pa. at 267, 312 A.2d at 34.

court conditioned its recognition of the appellant's claims to his marijuana-filled suitcase on the absence of any meaningful renunciation of control over it on his part. The latter fact was evidenced to the court's satisfaction by the placement of the suitcase beyond easy visibility in the apartment. The appellant's lack of a protected interest in the premises was deemed irrelevant to the determination of whether an illegal search had occurred.⁶⁰ Again, in *Commonwealth v. White*, the state supreme court cited a violation of both federal and state constitutional safeguards against unwarranted invasions of privacy, notwithstanding the appellant's lack of legal title to the apartment from which his clothing was seized by police investigating his involvement in a recent crime.⁶¹ The court found that neither the suspect's absence at the time of the search, nor the owner's consent to the intrusion were relevant considerations in determining if the accused's rights had been violated. Rather, the question was whether the accused had reasonably expected that his personal effects would not be subject to informal scrutiny by third parties without his acquiescence.⁶² Most recently, in *Commonwealth v. Treftz*, the Pennsylvania Supreme Court adopted criteria for determining the validity of privacy expectations.⁶³ These guidelines require an evaluation of the extent of the individual's control over the articles seized or premises searched and the frequency with which that control is exercised.

Although the *DeJohn* court did not expressly apply these earlier adopted guidelines, the facts of the *DeJohn* case conform reasonably well to the *Treftz* standards. If the bank is viewed as an indispensable medium for the transaction of one's financial affairs,⁶⁴ then a depositor has not "voluntarily" relinquished his control over the transferred information, for he has no other choice. The bank customer, like the individuals in *Platou*⁶⁵ and *Treftz*,⁶⁶ retained the right of access to the items seized from third parties without judicial authorization. Similarly, Mrs. DeJohn's frequent use of the banking facilities demonstrate that she retained control over the accounts which had generated the seized items.

Since the Pennsylvania Supreme Court has held that both the state and federal constitutional safeguards against unreasonable search do

60. *Id.* at 262-63, 312 A.2d at 31-32. See also note 58 *supra*.

61. 459 Pa. at 89-90, 327 A.2d at 42-43.

62. *Id.* at 88-89, 327 A.2d at 42.

63. 465 Pa. at 621-22, 351 A.2d at 268-69. See *Brown v. United States*, 411 U.S. 223 (1973), in which the Court made the individual's access to and control over the seized items the criteria for determining the reasonableness of his privacy expectations.

64. See text accompanying note 31 *supra*.

65. See text accompanying notes 59-60 *supra*.

66. See text accompanying note 63 *supra*.

not depend upon a direct seizure from the individual or from his premises,⁶⁷ the *DeJohn* court possessed a strong basis upon which to reject the restrictive fourth amendment analysis propounded in *United States v. Miller*.⁶⁸ Although earlier Pennsylvania cases had been based on privacy rights deemed present in both the federal and the state constitutions,⁶⁹ *DeJohn* marks the first time the court has based its decision solely upon state constitutional provisions against unwarranted intrusions into an individual's affairs.⁷⁰ It is significant that the *DeJohn* court also deviated from former Pennsylvania precedent by eliminating the necessity for an individual to have even a possessory interest in the confiscated articles. The prior rulings upheld the privacy expectations of the individual in items over which his legal or possessory claim was clear, however weak may have been his proprietary interests in the premises from which the articles were taken.⁷¹

However, while expanding the concept of constitutionally protected interests, the *DeJohn* court ignored the issue of whether it is the bank or the depositor who holds legal title to the bank's records of the business transactions. The court's silence in this matter indicates that legal title is not a prerequisite for claiming constitutional protection against the unauthorized seizure of items or information transferred to a third party. Instead, the *DeJohn* court utilized an alternative justification for establishing an individual's privacy rights in articles outside his direct control; that security in the transfer of such information is mandated by practical necessity within a business setting.⁷² This new criterion recognizes an individual's interests in articles, such as bank records, to which he has only a right of access without legal title or right of continuous possession. Thus, the major effect of the decision is its expansion of the scope of constitutionally protected privacy interests. It must also be noted that *DeJohn* recognized the depositor's right of privacy without recognizing a confidential relationship between the customer and the bank.⁷³ This suggests that the court did not want to grant absolute immunity against intrusion into banking

67. See notes 56-58 and accompanying text *supra*.

68. 425 U.S. 435 (1976). See note 20 and accompanying text *supra*.

69. See *Commonwealth v. Treftz*, 465 Pa. at 621, 351 A.2d at 268; *Commonwealth v. Platou*, 455 Pa. at 260, 312 A.2d at 31; *Commonwealth v. White*, 459 Pa. at 89-90, 327 A.2d at 42-43.

70. For discussion of the doctrine of adequate state grounds, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 470-89 (2d ed. 1973).

71. See text accompanying notes 56-58 *supra*. For example, the appellant in *Platou* had no proprietary interest in his friend's searched apartment. See note 56 *supra*.

72. 403 A.2d at 1289. See text accompanying notes 29-30.

73. 403 A.2d at 1291.

transactions, since to do so would jeopardize the state's authority to monitor banking practices.⁷⁴ The state court protected the transfer of information to the bank entirely on the basis of the practical compulsion of normal business practices which require the depositor to provide information identifying his creditors and debtors on his checks and loan applications. Thus, the federal view that in the absence of a legally recognized relationship, an individual chooses his confidants at his own risk,⁷⁵ was implicitly rejected by *DeJohn*. The *DeJohn* court declined to create such a legally protected bank-depositor relationship, choosing instead to extend privacy guarantees only to the information transmitted within that association.

Further clarification of the theoretical underpinnings of this latest extension of privacy rights will be required, since the *DeJohn* decision raises questions concerning the limitations of an individual's privacy interests. For example, it is not clear whether an individual must assert either an ownership claim or a privileged communication in order to contest the seizure of evidence transferred to a third party. For this reason, it is uncertain to what extent the "necessary communication" concept will serve as a guideline for the implementation of the *Katz* standard of reasonable privacy expectations, which Pennsylvania has adopted as the standard for freedom from unwarranted intrusion.⁷⁶ Although the *DeJohn* court applied the "necessary communication" concept to protect information transferred under a clear practical mandate, no guidelines were given to determine if "necessity" is to be determined by an objective or a subjective standard. Therefore, the outer limits of this new standard will have to be refined in future litigation. Finally, the court's ambivalent formula, which recognizes a bank customer's privacy rights while conceding that banking practices are subject to government surveillance,⁷⁷ raises questions concerning the proper balance between competing state and individual interests on this new fulcrum of necessity.⁷⁸

The most significant aspect of *DeJohn* is the court's willingness to construct a theory of state constitutional autonomy by drawing upon the rationale of selected federal precedents.⁷⁹ The *DeJohn* opinion marks a significant split between the federal and Pennsylvania courts on how individual rights are to be balanced with legitimate govern-

74. *Id.* See note 47 and accompanying text *supra*.

75. See *Lewis v. United States*, 385 U.S. 206 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966).

76. See note 40 and accompanying text *supra*.

77. 403 A.2d at 1291.

78. *Id.* at 1293. See text accompanying notes 45-47 *supra*.

79. See notes 37 & 40 and accompanying text *supra*.

mental interests.⁸⁰ By setting higher standards for search and seizure than the Federal Constitution requires, the *DeJohn* decision limits the scope of unreviewed government surveillance of information conveyed by individuals under practical necessity to third parties within a business context. It remains to be seen how this expanded definition of individual privacy rights will affect the state's power to regulate commerce in general and banking practices in particular, since *DeJohn* gives no guidelines for determining what communications are "necessary," and, therefore, constitutionally protected.

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80. In contrast to the federal court's restrictive interpretation of the fourth amendment rights of bank depositors, other state courts have advanced theories similar to those used by the Pennsylvania Supreme Court in *DeJohn* to uphold the privacy of a bank customer's accounts. The North Carolina, Idaho, and Florida state courts have stressed the contractual nature of the bank/depositor relationship by stating that the customer's expectations of privacy warrant the inference of a contractual term prohibiting third party disclosure by the bank without the depositor's consent. See *Milohnich v. First Nat'l Bank*, 224 So.2d 759 (Fla. Dist. Ct. App. 1969); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961); *Sparks v. Union Trust Co.*, 256 N.C. 478, 124 S.E.2d 365 (1962). Like the *DeJohn* court, the courts in these cases held that an individual depositor's banking transactions have a private and a commercial dimension, in contrast to the strictly commercial perspective taken by the federal courts. See also Merritt, *Banks and Banking: Florida Adopts a Duty of Secrecy*, 22 U. FLA. L. REV. 482 (1970).